No. 87-766

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BLAIR and JULIA CUNNINGHAM, Administrators of the Estate of Kathleen B. Cunningham, Deceased; and all others similarly situated,
Petitioners,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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PARTIES TO THE PROCEEDING

The named parties to this proceeding are Blair and Julia Cunningham, as administrators of the Estate of Kathleen B. Cunningham (deceased), and the Insurance Company of North America ("INA").

INA's ultimate parent company is CIGNA Corporation, a publicly traded company. INA is a wholly-owned subsidiary of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. In turn, INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc., the company directly owned by CIGNA Corporation. INA's parents have varying ownership interests in hundreds of domestic and foreign companies, including Connecticut General Corporation and Connecticut General Life Insurance Company, and a full listing of those companies will be provided if the Court requests. Other than wholly-owned subsidiaries, INA's own subsidiaries and affiliates are CIGNA Venture Capital, Incorporated (Delaware); INA County Mutual Insurance Company (Texas); Compagnie Financiere INA (France); CIGNA France Compagnie d'Assurances (France); CIGNA Sicav 1 (France); La Nouvelle, S.A. (France); Compagnie d'Assurances Colina S.A. (Ivory Coast); and INAMEX S.A. (Mexico). Through a wholly-owned subsidiary, INA owns a sixty percent interest in AFIA, an unincorporated association (of which the balance is owned by a wholly-owned subsidiary of INA Financial Corporation) which has indirect interests in foreign insurance and insurance-related companies.

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INSURANCE COMPANY OF NORTH AMERICA,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Respondent Insurance Company of North America ("INA") respectfully submits that the petition for a writ of certiorari should be denied. The decision by the Supreme Court of Pennsylvania correctly applied the law of Pennsylvania to this case, and petitioners have raised no question of federal law that merits review of that decision by this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, the decision below involved application of Section 106(c) of the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act No. 176, 1974 Pa. Laws 489, 501-02, 40 Pa.

Stat. Ann. § 1009.106(c) (repealed 1984), the pertinent subsections of which provided:

> *Time limitations on actions to recover benefits.*—
>
> (1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two years after the last payment of benefits.
>
> (2) If no-fault benefits have not been paid to the deceased victim or his survivor or survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If no-fault benefits have been paid for loss suffered by a victim before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or six years after the last payment of benefits, whichever is earlier.

STATEMENT OF THE CASE

This was an action to recover damages from respondent Insurance Company of North America ("INA") for an alleged breach of an insurance policy issued pursuant to the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act No. 176, 1974 Pa. Laws 489, 40 Pa. Stat. Ann. §§ 1009.101 *et seq.* (repealed 1984). The policy was issued to petitioners Blair and Julia Cunningham, and it covered their daughter, Kathleen Cunningham. On January 26, 1979, Kathleen Cunningham died as a result of injuries sustained in an automobile accident, and petitioners are the administrators of her estate.

Under the No-Fault Act, as ultimately interpreted by the Pennsylvania courts, the estate of an insured who died in an automobile accident may be entitled to recover benefits for loss of income ("work loss") resulting from the accident. *See generally Allstate Insurance Co. v. Heffner*, 491 Pa. 447, 421 A.2d 629 (1980). On March 29, 1984, more than five years after the accident that caused Kathleen Cunningham's death, petitioners brought this state court class action against INA for payment of work loss benefits allegedly due under the statute. But under Section 106(c) of the No-Fault Act, an action for work loss benefits following death in an automobile accident may be filed no more than four years after the accident. *See Kamperis v. Nationwide Insurance Co.*, 503 Pa. 536, 469 A.2d 1382 (1983). Since petitioners sued more than five years after the accident, INA asserted that statute of limitations as a defense.

In response, petitioners argued that their claims against INA were timely because the statute of limitations in the No-Fault Act had been tolled or suspended by the filing of an earlier state court class action entitled *Nye v. Erie Insurance Exchange*. In that case, the estate of Karen L. Nye, a victim of a fatal automobile accident

who had been insured by Erie Insurance Exchange (a company having no relation to INA), sued Erie for failure to pay work loss benefits under the statute. The action was filed on November 15, 1979, and it purported to cover claims arising during the preceding two years — that is, as far back as November 15, 1977. Kathleen Cunningham's accident had occurred during that time period, but petitioners were not named as plaintiffs in *Nye*; at that time, petitioners had not retained Nye's counsel to represent them.

The complaint in *Nye* named as defendants 30 insurance companies other than Erie, including INA, even though Karen Nye had not been insured by any of those companies; and it sought payment of work loss benefits on behalf of a class of estates of those companies' insureds. As acknowledged in the petition for certiorari (at 6), Nye's counsel named the other 30 insurance companies as defendants because he wanted to stop the statute of limitations from running in their favor on any claim for work loss benefits that might be asserted against them in the future. *See* App. 9a (*Nye* Complaint ¶ 17); 43a-44a (opinion below). The trial court in *Nye* dismissed the action against INA and the other defendants except Erie because the *Nye* plaintiff had no standing to sue them. Although the Pennsylvania Superior Court reversed that decision, the Supreme Court of Pennsylvania, in a further appeal, sustained the dismissal. *See Nye v. Erie Insurance Exchange*, 102 Dauph. Co. [Pa.] Rep. 308 (C.P. 1981), *rev'd*, 307 Pa. Super. 464, 453 A.2d 677 (1982), *rev'd in relevant part*, 504 Pa. 3, 470 A.2d 98 (1983). Thus, petitioners, who by 1984 had retained the same lawyer who had represented the plaintiff in *Nye*, argued that the statute of limitations in this case had been tolled by the filing of the earlier state court class action in *Nye* even though neither they nor any other INA insureds had been named as plaintiffs in that case and even though *Nye* had been dismissed

with respect to INA because no *Nye* plaintiff had standing to sue INA.

The trial court rejected petitioners' tolling argument and entered summary judgment for INA on the ground that the statute of limitations had run. App. 19a-20a, 23a. The Superior Court reversed, relying on its decision in *Miller v. Federal Kemper Insurance Co.*, 352 Pa. Super. 581, 508 A.2d 1222 (1986), that the *Nye* class action tolled the statute of limitations even though it was jurisdictionally defective for lack of standing. App. 29a-30a. In the decision below, the Supreme Court of Pennsylvania reversed the Superior Court and held that *Nye* did not toll the statute of limitations and that summary judgment therefore had been correctly entered in favor of INA. App. 36a-46a.

The Supreme Court of Pennsylvania reiterated in its decision that, under Pennsylvania law, the filing of a class action may toll the running of a statute of limitations for putative members of the class. App. 39a-40a. It held, however, that tolling does not occur "in cases like the present one, where the lack of standing of the class representative in the prior action, *Nye*, was apparent upon the face of the complaint filed therein." App. 41a. The court noted that the lack of standing to sue INA in *Nye* was patent and that petitioners' counsel had sued INA in *Nye* solely to toll the statute of limitations for future claims. App. 41a-42a, 43a-44a. Referring to that tactical objective, the court stated (App. 44a):

> We regard such an action as a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating

> litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.

The court rejected petitioners' argument that tolling should be permitted because the *Nye* action gave INA notice of claims against it, observing that "a patently non-justiciable class action suit" does no more than give notice of "the mere possibility of an actionable claim," which is insufficient to toll the statute. App. 45a. It also rejected the argument that a failure to permit tolling would invite intervention by putative class members in a large number of cases, emphasizing that its decision was based on such egregious facts as a patent lack of standing in the first case and dismissal of that case for lack of standing at the pleadings stage. App. 46a. The court based its decision on Pennsylvania law. *See* App. 39a-41a.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION OR OTHER IMPORTANT CONSIDERATIONS WARRANTING REVIEW BY THIS COURT.

The petition for certiorari should be denied because this case presents no special or important considerations that warrant review by this Court.

The statute of limitations question decided by the court below was entirely one of Pennsylvania law. It disposed of a state law cause of action for an alleged breach of an insurance policy and violation of a repealed Pennsylvania statute regarding automobile insurance — a cause of action having no federal basis. The court applied a Pennsylvania statute of limitations, Section 106(c) of the No-Fault Act, that can have no federal application. In considering petitioners' tolling argument, the court considered the effect of a Pennsylvania rule of civil procedure dealing with class actions within the Commonwealth, a rule that does not apply outside of the Pennsylvania state court system. The court below formulated and applied a rule of tolling to govern class actions in the Pennsylvania courts, and its rule is entirely a creature of Pennsylvania law.

The petition asks this Court to reverse the Pennsylvania Supreme Court's state law holdings. It complains that the state court misconstrued its own class action rules, as well as state rules governing statutory construction. Pet. at 13-15. Petitioners even complain that the Supreme Court of Pennsylvania — the highest judicial authority in the Commonwealth — has reversed or overruled decisions by the Superior Court of Pennsylvania, an inferior state tribunal, and they ask this Court to

intercede. *See id.* at 23-24. Clearly, petitioners misunderstand this Court's role, for, as the Court has observed many times, "We have no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis*, 476 U.S. __, 106 S. Ct. 1904, 1910 (1986). *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

To avoid this limitation, petitioners suggest that this case is appropriate for review because the decision below conflicts with this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). *See* Pet. at 15-18. As explained in the next section of this brief, there is no conflict. But even if there were a conflict, it would not be a reason for review by this Court. *American Pipe, Crown, Cork & Seal*, and the other federal decisions discussing tolling were decided under federal statutes and court rules; they presented no questions of federal constitutional law. Accordingly, the federal decisions are not binding on a state court considering the same issues under state law. *See, e.g., Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam). The court below was free to follow this Court's tolling decisions (as, in fact, it did (*see, e.g.*, App. 42a-43a)), or to ignore them altogether. Its choice was a matter of state law, and it presents no cause for review by this Court. *See International Longshoremen's Association, supra*, 106 S. Ct. at 1910 ("Nor do we review federal issues that can have no effect on the state court's judgment").

As another basis for certiorari, petitioners attempt to manufacture a federal question by referring periodically to some sort of violation of federal due process and equal protection rights, but their constitutional argument is confused and unreasoned. The due process contention

apparently is related to petitioners' persistent characterization of the decision below as "ad hoc," "unprecedented," "retroactive," and "unpredictable." *See, e.g.*, Pet. at i, 10. But there is nothing arbitrary or otherwise improper about the Pennsylvania Supreme Court's decision. The court's holding that a plaintiff may not misuse the class action process to subvert rules of standing and statutes of limitations did no more than to apply long-standing principles of justiciability, repose, ethical conduct, and judicial administration, and (as discussed in the next section of this brief) was fully consistent with other case law addressing this issue. The holding has general application to all similar cases in the Commonwealth. Pennsylvania certainly has a legitimate interest in curbing abuses of its procedures and in putting an end to stale claims, and the well-reasoned decision by the court below forbidding abuse of class actions to circumvent limitation rules was rationally related to attainment of that objective. Accordingly, there was no due process violation, for principles of due process afford the states broad latitude in framing their policies of repose. *See generally Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Montagino v. Canale*, 792 F.2d 554 (5th Cir. 1986); *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983), *cert. denied*, 467 U.S. 1231 (1984).

Petitioners' equal protection argument is even less cogent. Petitioners assert that the decision below somehow discriminates against a class of persons who will be barred from recovery because the statute of limitations has run on their claims. Petitioners suggest that some sort of invidious discrimination has been committed against that group while other insurance claimants have been permitted to recover because they "employed knowledgeable lawyers" who brought suit at an earlier

date. Pet. at 8, 25, 29. Of course, petitioners are completely correct that there is a distinction between persons who sued within the limitations period and persons who did not, but that distinction hardly gives rise to a viable equal protection claim. The Pennsylvania statute of limitations and the decision below that enforced it are completely rational means of attaining Pennsylvania's legitimate objectives of ending stale claims and preventing litigation abuses. Such rational statutes and tolling provisions do not deprive anyone of equal protection of the laws. *See generally G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

At bottom, the petition for certiorari is just an emotional, bombastic attack on the court below and its decision, based on the asserted (and incorrect) premise that petitioners have some sort of superior equitable entitlement to a decision in their favor. The petition is replete with misstatements that have no support in the record and vituperative assertions of insurers' misconduct that have no relation to any acts of INA. Most of the petition is merely a rhetorical diversion from the serious abuses discussed by the court below. Those rhetorical arguments are beside the point and require no further discussion here. The court below was fully within its authority in entering its decision, and there is no ground for this Court to review that decision. "This Court has no supervisory jurisdiction over state courts." *Chandler v. Florida*, 449 U.S. 560, 570 (1981). Since the decision below was based entirely on Pennsylvania law and raises no federal constitutional question of any merit, the petition for certiorari should be denied.

II. THE HOLDING BELOW THAT A STATUTE OF LIMITATIONS CANNOT BE TOLLED BY THE DELIBERATE FILING OF A PATENTLY DEFECTIVE CLASS ACTION WAS CORRECT AND WAS FULLY CONSISTENT WITH EXISTING PRECEDENT.

Even if there were some basis for federal review of this case, certiorari would be unwarranted because the decision below is correct and fully consistent with the decisions of this Court and other courts dealing with the tolling of statutes of limitations by the filing of class actions.

As the court below emphasized, the *Nye* class action was patently defective insofar as it sought to assert claims against INA. No *Nye* plaintiff was aggrieved by any conduct of INA; petitioners were not named parties in the *Nye* action. Since no one had standing to sue INA, the action was subject to dismissal at the outset, and, in fact, that is what occurred. *See generally Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974) (standing requirement for federal class representative); *McMonagle v. Allstate Insurance Co.*, 460 Pa. 159, 331 A.2d 467 (1975) (standing requirement for Pennsylvania class representative). Nevertheless, the complaint named INA as a defendant in a deliberate attempt to stop the statute of limitations from running on claims against INA. App. 9a, 43a-44a; Pet. at 6.

In this Court's leading decision on the tolling effect of class actions, *American Pipe*, *supra*, 414 U.S. 538, the Court specifically noted that it was not dealing with a contention that tolling resulted from a class action filed without standing. 414 U.S. at 553. It said that tolling would occur only for class members "who would have been parties had the suit been permitted to continue as a class action" (*id.* at 554), a qualification that could be

met in *Nye* only by insureds of Erie Insurance Exchange, not those of INA. The Court said that "a named plaintiff who is found to be representative of a class" must provide notice through the class suit of "the potential plaintiffs who may participate in the judgment." *Id.* at 554-55. But no INA insured was a representative of the *Nye* class, and, as the court below persuasively explained (App. 44a-45a), the *Nye* suit gave INA no notice of an actual adverse claim at all. This Court has adhered to the *American Pipe* requirements in its later decisions, particularly *Crown, Cork & Seal, supra*, 462 U.S. 345. Thus, the decision below holding that *Nye* did not toll the statute of limitations with respect to INA was fully consistent with the tolling precedents in this Court. *See also Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965) (requirement that first action be in "court of competent jurisdiction" to toll statute for later action).

Moreover, in his concurring opinion in *American Pipe*, Justice Blackmun warned that the Court's decision in that case "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561. Justices Powell, Rehnquist, and O'Connor repeated this warning in *Crown, Cork & Seal, supra*, 462 U.S. at 354. The lower federal courts have adhered to this view by refusing to apply the tolling doctrine when a danger of abuse is present. *See, e.g., Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986).

This case fits squarely within the abusive situation of which Justice Blackmun warned in *American Pipe*. By refusing to permit tolling through such a blatant

effort to abuse the class action procedure, the court below was in complete accord with the views of this Court and other courts regarding the limitations of class tolling. The decision below was neither novel nor unprecedented, and there is nothing about the decision that calls for this Court's review.

CONCLUSION

The petition for certiorari presents no issue that merits the time or attention of the Supreme Court of the United States. It should be denied.

Respectfully submitted,

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